IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

TUESDAY, THE 10TH JULY 2007 / 19TH ASHADHA 1929

CRL.A.No. 550 of 2007(C)

SC.517/2004 of ADDL. DISTRICT & SESSIONS COURT (ADHOC)I,
PATHANAMTHITTA
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APPELLANT:

GEORGE EAPPAN
C.NO.587
CENTRAL PRISON,
TRIVANDRUM

BY ADV. INNOCENT FRANCIS PAPPALI[STATE BRIEF]

RESPONDENT:

STATE OF KERALA,
REPRESENTED BY THE
PUBLIC PROSECUTOR OF
THE HON'BLE HIGH COURT OF KERALA
ERNAKULAM

BY PUBLIC PROSECUTOR SRI.PUZHAKKARA MOHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 10/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

CRL.A.NO.550 OF 2007-C

Dated this the 10th day of July, 2007.

JUDGMENT

Appellant is the accused in S.C.No.517/2004 on the file of the Additional District and Sessions Judge (Adhoc-I), Pathanamthitta. He faced trial for the offences punishable under Section 8(1) read with Section 8(2) of the Abkari Act on the allegation that the appellant was found in possession of 5 liters of arrack on 24.3.2001 at about 11.30 a.m without having any permit or license under the Abkari Act. To prove the case against the appellant, prosecution examined Pws 1 to 5 and relied on Exts.P1 to P10. MO1 was also produced. After closing the prosecution evidence, the appellant was questioned under Section 313 of the Code of Criminal Procedure. He denied the prosecution allegations and stated that he is innocent and the case was foisted against him by the excise officials. However, the trial court on considering the entire evidence, found the appellant guilty under Section 8(1) read with Section 8(2) of the Abkari Act and he was convicted thereunder and sentenced to undergo R.I for two years and to pay a fine of Rupees One lakh and in default of payment of the fine, S.I for a further period of one year was also ordered.

The benefit under Section 428 of the Code of Criminal Procedure was also allowed.

2. Since the appeal is filed through the jail authorities and the appellant is not having any counsel of his own choice, a member from the State brief panel has been appointed by this Court to defend the appellant in the appeal. This Court heard the learned counsel appearing for the appellant and the Public Prosecutor. The learned counsel appearing for the appellant had taken the following contentions for challenging the judgment of the trial court. Firstly it is contended that the trial court went wrong in placing reliance on the evidence of Pws 3, 4 and 5, who are the official witnesses, as the independent witnesses – PWs1 and 2 turned hostile to the prosecution. Secondly, it is contended that PW3, the Excise Inspector, had not complied with the provisions of the Abkari Act as well as the Kerala State Excise Manual while detecting the crime as he had not prepared the mahazar in the presence of the independent witnesses and he had not sent MO1 along with the sample for analysing the same in time as per Ext.P8 property list. The sample taken from the contraband article and the articles seized were reached the court only on 26.3.2001. Lastly, it is contended that the

punishment awarded against the petitioner is excessive.

3. In the light of the contentions raised by the counsel appearing for the appellant, it is to be decided in this appeal whether the judgment of the trial court is justified or not. As per the prosecution case, the appellant was found in possession of MO1 can containing 5 liters of arrack when Pws 3, 4 and other excise officials were on patrol duty on 24.3.2001 at about 11.30 a.m. The further case of the prosecution is that when PW3 and other excise officials were on patrol duty through the Pandalam – Kaipattoor public road in front of Susan Villa, house of one Varghese, the appellant was seen walking through the road from the opposite direction holding MO1 can in his hand and on questioning the appellant, it was revealed that the can contained 5 liters of arrack and the appellant was not having any license or permit issued under the provisions of the Abkari Act or the Rules framed thereunder. Further case of the prosecution is that PW3 had seized MO1 in the presence of Pws 1 and 2 and on preparing Ext.P1 seizure mahazar, PW3 had taken sample in two bottles having the capacity of 375 ml and 300 ml for analysis. Further case of PW3 is that after preparing Ext.P1 mahazar, the appellant was arrested and prepared Ext.P2 arrest memo.

Subsequently, the appellant and the contraband articles seized were produced before the court on the same day. Ext.P10 report of the chemical analysts, shows that the sample contained 31.14% ethyl alcohol by volume. To prove the prosecution case, the trial court relied on the evidence of Pws 3, 4 and 5 out of whom PW3 was the Excise Range Inspector who detected the crime and had taken sample from MO1 can which was seized as per Ext.P1 mahazar from the appellant. The evidence of PW3 was corroborate d with all material particulars by PW4, who was an excise guard accompanied PW3 at the time of detection of the crime. Though these two witnesses were cross examined, their evidence has not been shattered. Even though the prosecution examined Pws 1 and 2 as the independent witnesses to the incident, they turned hostile to the prosecution or they have admitted their signatures in Ext.P1 mahazar and other records. From the evidence of PW3, it is seen that he had taken the sample, labeled, sealed and produced the same before the court. When MO1 was produced before the court, a question was put to PW3 with regard to the seal affixed on MO1. He had stated that he had put the seal and got the signatures of the appellant and the independent witnesses also. The trial court went wrong in placing reliance on the evidence of Pws 3 and 4 as there is

no Rule to prove the prosecution case on the basis of the evidence adduced by the investigating officer or the official witnesses. From Ext.P1, it is clear that both Pws 1 and 2 were also present at the time of detection of the crime. Hence, there is no violation in any of the provisions of the Abkari Act or the Kerala Excise Manuel and there is no rule that the prosecution can prove its a case on the evidence of official witnesses if there exist any infirmity in their evidence. In the above circumstances, the trial court fully justified in believing the evidence of Pws 3 and 4 that the appellant was found in possession of MO1 can which contained 5 liters of arrack. The trial court also relied on the evidence of PW5, the Excise Range Officer, who had produced Ext.P10 chemical report which would show that the sample contained 31.14% of ethyl alcohol and the evidence adduced by this witness would show that the sample was got analysed as per the request made by PW3 before the court. Hence, the evidence of PW5 is also accepted by the court to find that the appellant was found in possession of MO1 can which contained 5 liters of arrack without having any license or permit.

In the above circumstances, this Court is of the view that the findings entered by the trial court are on evidence. Hence, the

conviction entered against the petitioner under Section 8(1) for the possession of 5 liters of arrack is justified. The next question to be decided in this appeal whether the punishment imposed against the petitioner is excessive or not. The trial court considered the materials produced before the court and found that the petitioner was found in possession of 5 liters of arrack. Accordingly, this Court is of the view that two years R.I under Section 8(1) read with 8 (2) is not excessive. But with regard to the default of payment of fine of Rupees One lakh, the trial court imposed S.I for two years. This Court is of the view that the default sentence of two years is excessive. Hence, the default sentence is reduced to six months. In all other respects, the appeal stands dismissed confirming the judgment of the trial court.

K. THANKAPPAN, JUDGE.

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